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C O N F I D E N T I A L SECTION 01 OF 04 NAIROBI 001838

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SUBJECT: POST-ELECTION VIOLENCE COMMISSION BEGINS HEARING  
TESTIMONY

REF: NAIROBI 1170

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SUMMARY  
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11. (SBU) The Commission of Inquiry into Post-Election Violence (the Waki Commission) has begun hearing testimony from security officials, and civil society organizations. The heads of the main Kenyan security agencies have testified. Each attempted to portray, with varying degrees of success, his organization as having responded responsibly to the post-election violence. NGO leaders have testified on police failure to contain the violence, and accused police of using excessive force and participating in gender-based and sexual violence (GBV). The Commission has heard evidence in camera regarding financiers and organizers of post-election violence. The Commission received a one-month extension of its mandate, less than the two month extension it sought. Political considerations appear to have played a part in the decision. Key Commission officials have warned that the Waki Commission needs to dampen high public expectations to name names of those responsible for organizing and financing the violence. However, its short mandate and competing demands for the Commission's limited investigatorial capacity make this highly unlikely. Even with these limitations, the Commission's report could lay the groundwork for further investigations. However, the decision to grant a shorter extension of its mandate indicates that the Grand Coalition has closed ranks and is unlikely to vigorously pursue organizers and financiers of post-election violence. End Summary

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Mission and Mandate  
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12. (U) The Commission of Inquiry into Post-Election Violence (the Waki Commission) is one of three Commissions arising from the Kofi Annan-led mediation process. The Commission is chaired by Kenyan Appellate Judge Philip Waki. Its other Commissioners are Pascal Kambale, a Congolese human rights lawyer, and Gavin McFayden, a former deputy commissioner of the New Zealand national police force. The Waki Commission is mandated to investigate the post-election violence (defined as the period from December 28, 2007 until February 28, 2008). It has the mandate to investigate acts and omissions of state actors, as well as individuals and militias who operated in the post-election crisis. It is

expected to recommend measures to bring to justice any persons responsible for criminal acts (reftel).

13. (U) The Waki Commission's terms of reference were gazetted in late May. It follows an inquiry model: Witnesses are entitled to have counsel present and enjoy the right to cross-examine adverse witnesses. Before beginning its hearings, the Commission consulted widely with stakeholders, including civil society organizations, political parties, and government institutions to determine sources of information for the work of the Commission.

14. (C) The consultations showed that the amount of information that the Commission needs to process is daunting. As a result, even before hearing testimony, Chairman Waki requested that President Kibaki extend the mandate of the commission by two months. On July 23, the Commission was granted only a one-month extension of its mandate. Secretary to the Commission George Kegoro and Commission Counsel David Majanja told poloff that the one-month extension was insufficient to allow a full exploration of its mandate. They both suggested that political considerations played a role in the decision.

15. (SBU) According to Kegoro, the Commission is fully funded, receiving its funding from the GOK and donors (whose funds are administered by UNDP). The GOK has made in-kind contributions such as office space, security, and vehicles. In addition, UNIFEM has provided a gender-based violence expert to work with the Commission. Kegoro noted that the GOK has been forthcoming, albeit slow, in fulfilling Commission requests. Kegoro noted that UNDP is slow in releasing funds,

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which has caused planning problems for the Commission.

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Testimony ) Violence Overwhelmed Police  
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15. (U) The Commission began its public hearings on July 9. Its first week of testimony was largely taken up by appearances of key figures in the Kenyan security establishment -- the Police Commissioner, the permanent secretary of the Ministry of Internal Security, the head of the intelligence service, and the Army Chief of Staff. Each tried, with varying degrees of success, to portray his organization as having executed its duty professionally and in a non-partisan manner.

16. (U) Police Commissioner Hussein Ali was the first witness called. Commissioner Ali admitted that the police had received intelligence predicting violence from the NSIS. He stated that police did the best they could in the situation, but had been overwhelmed by the scale of the violence. He testified that no "shoot to kill" order was given, but noted that police on the ground were able to make decisions on the appropriate level of force according to circumstances they were facing. To the disbelief of many, Ali denied that he was aware of incidents in which police officers used excessive force. (Note: a number of incidents of police using excessive force were filmed and broadcast locally and internationally. End Note.)

17. (U) The Director General of the National Security Intelligence Service (NSIS) stated that the NSIS had fully briefed relevant organizations on its assessment that violence was likely regardless of the election's outcome. He denied that the NSIS had been politicized. Likewise, the Chief of the Administration Police denied that his troops had been politicized. The Chief of Army General Staff noted the Army was reluctant to deploy to quell civil unrest. (Note: During the crisis, army reluctance to deploy was rooted in the fear that the army could split along tribal lines, much like the police force. End Note). He stated that the military mission was limited to facilitating humanitarian assistance and supporting police operations. He noted that he

had not received reports of abuses by soldiers.

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NGOs criticize police role  
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¶8. (U) Representatives of NGOs called to give testimony were generally critical of the police response to post-election violence. Muthoni Wanyeki, the Executive Director of the Kenyan Human Rights Commission (KHRC, which is independent of the state-financed Kenyan National Commission for Human Rights), claimed that the police (and the army) often took sides in the post-election violence. She accused the police of having tortured demonstrators. An anti-torture organization noted that it had undertaken 80 post-mortems of gunshot victims. It obtained witness statements in 30 percent of these cases which claimed that police were the shooters. In response to these allegations, the Police took out full page ads in major print media outlets calling their allegations &baseless.<sup>8</sup> The Chairman subsequently admonished the Police Commissioner for the ads, and asked that the police not raise issues that are under investigation by the Commission.

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Naming Financiers and Organizers  
Of Post-Election Violence  
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¶9. (C) Several NGOs and the Director General of the NSIS testified that they possessed evidence implicating individuals, among them politicians, who had financed and organized militias to perpetrate post-election violence. Among the NGOs offering such information is the EMO foundation, a grassroots Kalenjin organization (which has received USG funding to undertake reconciliation efforts in Rift Valley). Representatives of these organizations were

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asked to give further details in camera, to allow the Commission to evaluate the reliability of the evidence. The Commission stated that this evidence could be used to issue summonses to persons of interest. A Human Rights Watch researcher who was in the Rift Valley during the post-election period told poloff that only lower level political figures could be directly connected to the violence. He noted that it will prove difficult to directly link politicians widely thought to be involved in financing and organizing the violence, such as Minister of Agriculture William Ruto, a number of Rift Valley MPs, but also some Kikuyu politicians. The Secretary and Counsel to the Commission agreed with this assessment.

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Gender-based violence  
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¶10. (U) The Commission has no women commissioners, but it has made significant efforts to draw attention to gender-based and sexual violence (GBV). The Commission has heard two days of testimony on GBV including statements by the directors of the National Commission on Gender and Development and the Federation of Kenyan Women Lawyers (FIDA), each of whom accused some police officers of raping women and related incidents where police turned away victims seeking to report crimes. They also noted that men were also victims of sexual abuse during the violence. The Commission asked the representatives to deliver lists of witnesses and statements to allow the Commission to consider how to best treat the issue in its deliberations. Chairman Waki has also stated publicly that the issue of GBV is one of the most important under consideration by the Commission.

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Public Hearings in  
Violence-affected areas  
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¶11. (SBU) Beginning in August, the Waki Commission will hold a series of public hearings in locations most affected by post-election violence (Kisumu, Eldoret, Nakuru, and Naivasha). These hearings will provide the public a chance to bear witness to the suffering. Secretary Kegoro stated that time and resource constraints will prevent the Commission from visiting Central Province locations (such as Thika and Nyeri) where many internally displaced Kikuyu have taken up residence.

¶12. (SBU) Kegoro stated that the Commission has been focused completely on the hearings. He noted that they had not worked out the manner in which the Commission's report will be presented nor had they considered the way in which the Commission's recommendations might be relayed to the yet-to-be-formed Truth, Justice, and Reconciliation Commission.

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COMMENT  
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¶13. (SBU) The Commission has tackled difficult issues right off the bat, which is encouraging. Its decision to call the leading figures in Kenya's security apparatus to testify publicly has given the public insights into how these agencies do their work. The inquiry model has also presented NGOs a rare chance to confront security agency heads in a public forum. This strong start has raised expectations among a Kenyan public eager for accountability for those who brought the country to the brink of civil war. However, the limited duration of the Commission's mandate and the relatively modest resources allotted to it do not permit the Commission to undertake a definitive account of post-election violence, as the Kenyan public expects. Given the time and resources available to it, the Commission is likely to produce a report which suggests further avenues of inquiry. The decision to grant a shorter extension than requested hampers the Commission; it suggests that the Grand Coalition has decided to "close ranks" to minimize the chance that the Waki Commission's report could rock the boat. We will

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continue to follow the work of the Commission and weigh in with key players to push for implementation of its recommendations. End Comment.  
SLUTZ